COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-3502

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO GREG H. L., A PERSON UNDER THE AGE OF 18:

GAIL M. AND ROGER M.,

PETITIONERS-RESPONDENTS,

V.

JEROME E. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Jerome E.M. appeals the termination of his parental rights to his son, Greg H.L. He ascribes the following errors to the circuit court: (1) it lacked jurisdiction to terminate his parental rights; (2) it was not a proper venue; (3) it lacked sufficient factual evidence to find abandonment or failure to assume parental responsibility as grounds for terminating his parental rights; (4) WIS. STAT. § 48.415(1)(c) is unconstitutional because it shifts the burden of proof to Jerome to show good cause; (5) WIS. STAT. § 48.424(4) is unconstitutional because it forced the circuit court to conclude that Jerome was unfit after it had found grounds for termination; (6) it should have applied claim preclusion or issue preclusion to bar this action; and (7) the real issue was not fully tried in the circuit court, so reversal is warranted under WIS. STAT. § 752.35. Because we conclude there is no merit to any of Jerome's contentions, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Gail M. and Jerome are the parents of Greg, who was born June 28, 1991, in Wisconsin. Jerome and Gail have never been married, and Jerome, who maintains residences in both Wisconsin and Hawaii, contributed nothing to the costs of Gail's pregnancy or Greg's birth. Additionally, he has paid no child support, nor has he provided any other financial support, such as health insurance, school fees, or clothing allowance.

¶3 When Greg was almost three years old, Jerome petitioned Milwaukee County Circuit Court to be adjudicated his father. That adjudication

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

occurred in the circuit court on June 24, 1997.[2] Subsequent to the determination of paternity, Jerome still did not make child support payments, cover health insurance costs, clothing costs, or school fees costs, or in any other way provide financial support to Greg. He has also provided no emotional support for his child. Jerome has never seen or visited Greg, nor has he communicated with or attempted to communicate with him or anyone else who could have provided information about Greg, except for a conversation in 1995 with the then-guardian ad litem, Kevin Dunn.

¶4 Since Greg was one year old, he has resided with Roger M. in addition to Gail. Gail and Roger filed a petition to terminate Jerome's parental rights on July 19, 1999, in Rock County Circuit Court, and Roger has petitioned to adopt Greg if Jerome's parental rights are terminated.

¶5 On October 5, 1999, the circuit court held a fact-finding hearing on the termination petition. Testimony was adduced showing past threats and violent conduct by Jerome, both in regard to his wife and children during his first marriage and in regard to Gail. Those threats caused Gail to seek restraining orders prohibiting Jerome from contacting her. However, they had expired before she filed the termination petition. Based on the testimony at the October 5 hearing, the court found that Jerome had abandoned Greg and had failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(1) and (6). The court then found that Jerome was unfit pursuant to WIS. STAT. § 48.424(4).

[2] Gail appealed the judgment of paternity, which appeal was pending when the petition to terminate Jerome's parental rights was filed.

¶6 A dispositional hearing was held on May 18 and 19, 2000, wherein the court evaluated whether the standard for the termination of parental rights, "the best interests of the child" pursuant to WIS. STAT. § 48.426(2), had been met. After a full evidentiary hearing, the circuit court concluded that it was in Greg's best interests to terminate Jerome's parental rights, and it so ordered. Jerome appeals.

DISCUSSION

Standard of Review.

¶7 A determination of what is in the best interests of a child is a mixed question of fact and law. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 153, 551 N.W.2d 855, 857 (Ct. App. 1996). We will not reverse a factual determination made by a circuit court unless it is clearly erroneous. WISCONSIN STAT. § 805.17(2); ***Hur v. Holler***, 206 Wis. 2d 335, 342, 557 N.W.2d 429, 432 (Ct. App. 1996). The construction and application of a statute under facts as found by a court present a question of law that we review independently. ***I.P. v. State***, 157 Wis. 2d 106, 118-19, 458 N.W.2d 823, 829 (Ct. App. 1990), *aff'd* 166 Wis. 2d 464, 480 N.W.2d 234 (1992). We will not reverse a discretionary decision of a circuit court about whether to terminate parental rights unless that discretion was erroneously exercised. ***Gerald O.***, 203 Wis. 2d at 152, 551 N.W.2d at 857.

¶8 Whether claim preclusion or issue preclusion, or both, may be applied to the facts as found by the circuit court is a question of law that we review *de novo*. ***A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 472, 515 N.W.2d 904, 906 (1994).

Jurisdiction and Venue.

¶9 Jerome challenges the subject matter jurisdiction of Wisconsin courts in general and the venue of the Rock County Circuit Court, specifically. He contends that the petition to terminate his parental rights is insufficient under ch. 822 because it did not provide Greg's correct current address and a list of the places he had lived within the last five years. Jerome contends the facts set forth in the pleadings are false because the petitioners have lived outside of Janesville for the last five years, although they gave Janesville addresses in the petition.

¶10 Proceedings to terminate parental rights are statutory. Subject matter jurisdiction and venue are set forth in ch. 48. WISCONSIN STAT. § 48.14(1) provides that the court assigned to exercise jurisdiction over the children's code has "exclusive jurisdiction over: (1) The termination of parental rights to a minor in accordance with subch. VIII." Additionally, WIS. STAT. § 48.15 provides that the jurisdiction granted courts under ch. 48 is "paramount" in cases involving the termination of parental rights. By contrast, ch. 822 involves interstate disputes about custody. Additionally, circuit courts of Wisconsin are courts of plenary jurisdiction. They do not depend solely on statute for their powers. ***P.C. v. C.C.***, 161 Wis. 2d 277, 298, 468 N.W.2d 190, 198 (1991). Therefore, no circuit court is lacking subject matter jurisdiction to decide issues of custody presented to it. ***Id.*** However, there are circumstances under ch. 822 where a Wisconsin court will refrain from exercising its jurisdiction. ***Id.*** at 299, 468 N.W.2d at 199.

¶11 The Wisconsin Supreme Court has interpreted ch. 822 as providing guidance to a court in intrastate jurisdictional disputes. ***David S. v. Laura S.***, 179 Wis. 2d 114, 141, 507 N.W.2d 94, 104 (1993). As the supreme court explained, it adopted an interpretation of chs. 48 and 822 that "furthers the purposes of the

respective chapters … in every child custody and termination of parental rights case, the circuit court must consider whether the provisions of chapter 822 apply." ***Id.*** The supreme court then explained that when a matter is pending under ch. 48, the circuit court must decide whether there is a custody dispute involving persons outside of the state who claim jurisdiction in that other state and also whether any action concerning the child is pending in any state, including Wisconsin. ***Id.*** However, ch. 822 does not apply to intrastate disputes. ***Id.*** at 136, 507 N.W.2d at 101.

¶12 Here, Jerome does not claim that the State of Hawaii is a proper jurisdiction for this dispute, but rather, he simply objects to Wisconsin courts exercising jurisdiction. He suggests that whatever state Greg spends most of his time in is probably the proper jursidiction, but he does not explain how the courts of that state could have personal jurisdiction over him when he has never visited or communicated with Greg in any way in that other state. Additionally, he ignores the paternity proceeding that he filed in the State of Wisconsin, which was still pending on appeal on July 19, 1999, when this action was filed, giving the Milwaukee County Circuit Court continuing jurisdiction. The circuit court reviewed all of these factors and also found that Gail and Roger have Wisconsin driver's licenses, pay taxes in Wisconsin, maintain a residence in Rock County and Greg was present in Rock County on the date the petition was filed. Those findings are not clearly erroneous and are sufficient to support its conclusion that the circuit courts of Wisconsin could exercise jurisdiction. ***State of Wisconsin ex rel. Bohren v. Circuit Court for Milwaukee County***, 192 Wis. 2d 407, 420-22, 532 N.W.2d 135, 140-41 (Ct. App. 1995).

¶13 Furthermore, the circuit court did consider ch. 822 when it noted the paternity proceeding in Milwaukee County which was then on appeal, and it did

consider its exclusive jurisdiction under WIS. STAT. § 48.14 because of the presence of the child in the county. Therefore, we agree with the circuit court that it had jurisdiction over the termination of parental rights proceeding.

¶14 Venue for a termination of parental rights proceedings is set under WIS. STAT. § 48.185(1) which provides in relevant part:

> [V]enue for any proceeding under ss. 48.13, 48.133, 48.135 and 48.14(1) to (9) may be in any of the following: the county where the child … is present. Venue for proceedings brought under subch. VIII is as provided in this subsection except where the child has been placed and is living outside the home of the child's parent pursuant to a dispositional order ….

It was undisputed that Greg was in Rock County, Wisconsin on July 19, 1999, when the petition was filed. Therefore, Rock County is a proper venue for the termination proceeding pursuant to § 48.185(1).

Grounds.

¶15 The circuit court found that both grounds for termination alleged in the petition had been proved: abandonment and failure to assume parental responsibility. These are factual findings and they will not be reversed on appeal unless they are clearly erroneous. ***Gerald O.***, 203 Wis. 2d at 152-53, 551 N.W.2d at 857; WIS. STAT. § 805.17(2).

¶16 There was credible evidence to show that Jerome had no relationship with Greg. He had not contributed to the support of Gail during her pregnancy or during delivery. He had not offered to pay or paid child support. While he maintains that he set up a fund for Greg, Greg cannot receive payments from that fund unless he changes his name to Jerome's surname rather than retaining the one on his birth certificate. Additionally, Jerome has complete control over that fund

so no monies could be taken out of it without his direct authorization. Furthermore, he has not tried to learn anything about Greg's development since 1995. He has not contacted the guardian ad litem for the paternity proceedings which he, himself, initiated in order to learn about Greg's health, Greg's care, how he is doing in school, what his interests or hobbies are or anything else about the child. The circuit court's finding that he has not had contact with him for six months or more, as is required by the statute for abandonment, is not clearly erroneous. In a like fashion, the circuit court's determination that he has failed to assume parental responsibility is overwhelmingly demonstrated by the record presented on appeal. Therefore, the circuit court's findings that abandonment and failure to assume parental responsibility have been proved are not clearly erroneous, and we affirm them.

Constitutional Challenges.

¶17 Jerome challenges the constitutionality of WIS. STAT. § 48.415(1)(c) because of its burden shifting capacity, and he challenges WIS. STAT. § 48.424(4) which requires the court to find unfitness after other predicate factual findings have been made. On appeal, Gail asserts that neither of these challenges were raised before the circuit court and therefore should not be considered on appeal. Jerome cites his trial brief to dispute this assertion. Page 10 of that brief mentions § 48.424(4), but only in regard to the preclusion doctrines discussed in the next section of this decision. Section 48.415(1)(c) is challenged on a constitutional basis, but Jerome withdrew that challenge before this court while recognizing the effect of ***Odd S.-G. v. Carolyn S.-G.***, 194 Wis. 2d 365, 533 N.W.2d 794 (1995). Therefore, because the circuit court did not have the opportunity to consider Jerome's challenge to § 48.424(4), the only constitutional challenge he has not withdrawn, and because there is no indication in the record that the attorney

general's office was notified as is required, we will not consider them on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140, 145 (1980); WIS. STAT. § 806.04(11).

Claim Preclusion/Issue Preclusion.

¶18 Jerome next argues that the prior paternity determination, which concluded that he is Greg's biological father and ordered periods of physical placement of Greg with Jerome contingent upon Jerome meeting certain conditions, prevents the termination of his parental rights. In his brief, he labels the argument "res judicata," and he also asserts that Gail should be collaterally estopped by the paternity proceeding from petitioning to terminate his parental rights. The Wisconsin Supreme Court has chosen different words to describe res judicata and collateral estoppel. Res judicata is now known as claim preclusion, and collateral estoppel is now known as issue preclusion. ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 232 n.25, 601 N.W.2d 627, 636 n.25 (1999). However, notwithstanding the label applied to these doctrines, the tenets underlying them remain the same. Claim preclusion establishes that a final judgment between the same parties or their privies is conclusive for all subsequent actions between those same parties, as to all matters which were or which could have been litigated in the proceeding from which the judgment arose. ***Amber J.F. v. Richard B.***, 205 Wis. 2d 510, 516, 557 N.W.2d 84, 86 (Ct. App. 1996). To be applied, claim preclusion requires: (1) identity of parties or their privies in both actions; (2) a prior final judgment on the merits by a court with jurisdiction; and (3) identity of causes of action in the two suits. ***Sopha***, 230 Wis. 2d at 233-34, 601 N.W.2d at 637.

¶19 In the paternity proceeding, Jerome claimed that he was Greg's father. The petition to terminate Jerome's parental rights is not a collateral attack on the judgment that Jerome is Greg's biological father, but rather a claim that it is in Greg's best interests to have Jerome's parental rights terminated. No determination was made on this later claim during the paternity proceeding. Additionally, Gail was not required to raise her claim as a counterclaim in the paternity action. ***A.B.C.G. Enters.***, 184 Wis. 2d at 476, 515 N.W.2d at 908. Claim preclusion does not bar this proceeding to terminate Jerome's parental rights.

¶20 Issue preclusion "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 326 (1979). As a threshold matter, issue preclusion, unlike claim preclusion, requires more than a judgment on the merits. For issue preclusion to be applied, there must have been actual litigation of the same issue that was necessary to the outcome of the first action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723, 727 (1995). While issue preclusion can prevent re-litigation of issues actually litigated and determined in a prior lawsuit, even if the cause of action in the second lawsuit is different from the first, its ultimate application is a discretionary decision of the circuit court whether it should be applied. ***Crowall v. Heritage Mut. Ins. Co.***, 118 Wis. 2d 120, 125, 346 N.W.2d 327, 330 (Ct. App. 1984).

¶21 Here, the circuit court determined that Greg's best interests would be furthered by terminating Jerome's parental rights. Jerome asserts that the court could not have determined him to be the biological father of Greg without making a contrary finding. We disagree. The court did not determine whether it was in

Greg's best interests to adjudicate Jerome as his father. And, even if it had, the paternity action did not address whether Jerome had abandoned Greg or failed to assume parental responsibility for him, but rather, whether he had the legal right to parent him. Therefore, we conclude that the circuit court did not err in refusing to apply issue preclusion to bar this action.

Discretionary Reversal.

¶22 As a last argument on appeal, Jerome contends that the real issue has not been tried and therefore we should order a new trial. We do have the authority to order a new trial if the real issue has not been fully tried. ***State v. Ambuehl***, 145 Wis. 2d 343, 366, 425 N.W.2d 649, 658 (Ct. App. 1988); WIS. STAT. § 752.35. To do so, we would need to determine that a new trial would likely produce a different result. ***Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde***, 185 Wis. 2d 377, 391, 518 N.W.2d 265, 269 (Ct. App. 1994). Here, both grounds for termination asserted in the petition and the factors upon which the circuit court exercised its discretion in ultimately determining that a termination of parental rights was in Greg's best interests were fully and completely litigated. This is not an extraordinary case that requires another trial. Children are not chattel to be fought over indefinitely. They need the stability that the circuit court so carefully tried to provide. ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672, 599 N.W.2d 90, 97 (Ct. App. 1999).

CONCLUSION

¶23 Because we conclude that the circuit court properly exercised jurisdiction in a correct venue and that its factual findings and legal conclusions are fully supported by a complete record, we conclude that its discretionary

determination to terminate Jerome's parental rights to Greg was not erroneous. Accordingly, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. WISCONSIN STAT. RULE § 809.23(1)(b)4.